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In the Supreme Court of the State of Utah

ACE S. RAYMOND,

Plaintiff and Respondent,

—VS.—

IVER L. LARSEN, Cache County Clerk
and Auditor.

Defendant and Appellant.

FILED

10 1901

Clark, Supreme Court, Utah
Case No. 9404

RESPONDENT'S BRIEF

Appeal from the First Judicial District Court
in and for Cache County, State of Utah.

Honorable Lewis Jones, Judge

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Respondent.

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In the Supreme Court of the State of Utah

WILLIAM S. RAYMOND,

Plaintiff and Respondent,

— vs. —

ROBERT L. LARSEN, Cache County Clerk

and Auditor.

Defendant and Appellant.

Case No. 9404

Plaintiff brought this action on Mandamus proceedings against the defendant to seat the plaintiff as County Commissioner of Cache County and to obtain a Declaratory Judgement determining his right to qualify and serve as county commissioner without abandoning his contracting business with public agencies, excepting Cache County.

The District Court determined the issues of Law in favor of the plaintiff and entered judgment accordingly as prayed for by the plaintiff, and the defendant appealed.

This case is here on a stipulation of facts so that only questions of law are involved.

STATEMENT OF POINTS

The specific question is whether or not a County Commissioner (who happens to be a contractor) can enter into a contract with a District School Board to build a school building and secondly can he continue to contract with other State and public agencies while serving as County Commissioner?

The answer to this question is dependent upon the meaning or interpretation given to two laws of the State:

1. Does the entering into and performing such a contract while serving as County Commissioner violate the provisions of Section 17-5-10 Utah Code Annotated 1953, which reads as follows:

No member of the Board (of County Commissioners) shall be interested, directly or indirectly, in any property purchased for the use of the county, or in any purchase or sale of property belonging to the County, *or any contract made by the board or other person on behalf of the county for any purpose whatsoever.*" (Emphasis added)?

2. Does the entering into such contract and intending to enter into similar contracts with Public Agencies in the future, while serving as County Commissioner, violate the provisions of Article XII, Section 8, of the Utah Constitution, which reads as follows:

--The making of profit out of public monies, or using the same for any purpose not authorized by law, by any public officer, shall be deemed a felony and shall be punished as provided by law, but part of such punishment shall be disqualification to hold public office."?

This language is used in Section 76-28-61 U.C.A., 1953, supplementing the Constitution into the criminal code. The next section 76-28-62, U.C.A., 1953, defines public moneys as follows:

"The term "public moneys" as used in the three preceeding sections, includes all bonds and evidenced of indebtedness and all money belonging to the State or to any town, city, or county, precinct or district therein, and all money, bonds and evidence of indebtedness received or held by state, county, district, city, town or precinct officers in their official capacity."

ARGUMENT

Point 1

Taking up the first proposition, does Section 17-5-10, U. C. A., 1953, prohibit a County Commissioner from being interested in, or a party to, a contract with a District School Board of Education?

Counsel for Appellant apparantly were unable to locate authorities covering either of the questions above.

This appears to be a case of first impression in this State. An extended search of the authorities by the writers has failed to reveal any case that throws much

light on the question here presented.

Although the section has been on the books for more than half a century, it has only been referred to in one case in this state: Engle County Commissioner vs. District Court of Carbon County et al. 96 Utah 245, 82 P.2d 627.

In that case the defendant County Commissioner "at a full meeting of the Board of County Commissioners moved a sale from the County to one Dan Cole (appearing openly for himself but secretly for himself and the accused" county commissioner) of a tract of land then owned by the county.

The court in holding these facts to be in violation of the above statute says:

"The reason for the prohibition of the statute is that which underlies the law of fiduciaries everywhere. The County Commissioners by virtue of their office occupy a trust relation to the County property. The law does not permit a trustee to profit from the handling or sale of trust property. . . . He cannot be allowed to function for the County as vendor and at the same time be interested, directly or indirectly, as purchaser in the property to be sold. As agent for the vendor he would seek to obtain the best price and terms reasonably practicable, while as purchaser his personal interest would persuade him to sacrifice the interests of the vendor in order that he as purchaser may drive a more profitable bargain. No man can serve two masters is a maxim of old but now more true than now".

The case appears to be entirely proper and to be typical of many cases in the books but we have been unable to find any case that such a County Commissioner may not have an interest in contracts with other separate entities.

The express terms of the statute prohibit the County Commissioner from having an interest in a contract *with the County* or in the sale of property by the county. It could have said "or any other public entity". It is submitted this it did not do because the reason for the rule viz: "Conflict of Interest" does not apply in such case. The County Commissioner has no interest as such or no vote or control in any way over the contract made by the school board. The school board are the parties whose interest it is to get the best contract they can for the building of the school building. The Contractor though he may be an officer in another public agency has no interest in the matter except to get the contract price lower than any of the other bidders, and if he fails to become low bidder he does not get the contract. To say that this is a conflict of interest we submit would be judicial legislation which should not be indulged in by the courts, but should be left to the legislature.

That the Board of Education is a separate entity or agency appears from Chapter 4 Title 53 U.C.A., 1953.

This chapter provides for both City and County School Districts for consolidation of districts in coun-

ties. Section 53-4-8 U.C.A., 1953, provides that **Boards of Education of every School District** shall be a body corporate and generally provides their powers. The act then puts control of school contracts and property in the hands of the School Board.

Since appellant in his brief apparently does not contend that the County Commissioners are not a separate public entity from the School Board or that there is a conflict in interest involved here we will not pursue the matter further here.

Section 53-6-9 U.C.A., 1953, prohibits the members of the school board from being directly or indirectly interested in any contract with the school board. This is similar to section 17-5-10, U.C.A., 1953, as to County Commissioners in county contracts. But here again the prohibition does not mention contracts with other public entities.

The Idaho case of *Ex Parte Howell* 150 Pac 19 was a criminal prosecution of a County Commissioner for alleged interest in a County Contract. The Idaho Statute is similar to ~~2481's~~ ^{2481's} (17-5-10 U.C.A., 1953) "Interest of County Commissioners in a contract."

In this case a Contract for repairs of roads was awarded to general contractor. Thereafter contract was awarded sub-contracts to co-partnership wherein county commissioner was a co-partner. The Idaho Court held that the County Commissioner must have had an interest

time of the execution of the contract, and said:

"The purpose of the statute in question is to prohibit county commissioners from being interested, directly or indirectly, in a contract, or in the benefits to be derived therefrom, at or prior to the time the contract is awarded. Men are penalized for wrongdoing; not for engaging in legitimate business, or seeking and accepting legitimate employment."

"The partnership had no business dealings with the County. The County was not responsible to the partnership. The original contractor was responsible to the subcontractor and was solvent."

A contractor has the right to enter the field of employment, and let subcontracts for the doing of work under his contract, and it was never the intention of the legislature to restrict the citizens of this state from entering into fair and legitimate contracts . . ."

It would seem that this Idaho case would not be controlling in the case at bar because of the difference in the facts, but the statements of the Court cited might properly be applied to this case, that a contractor not having conflicting interest in fact, is not barred from conducting his legitimate business. The Idaho case cited by appellant and those cases cited therein were all cases where the Commissioners had direct contracts or services with their own agency which distinguishes them from our case.

POINT II

Is this contract in violation of Article XIII, Sec. 8, Utah Constitution and implementing statutes:

This law makes it a felony to make a profit on public monies, or the using of the same for any purpose not authorized by law.

Here again we have not been able to find any case in point and the laws have never been construed in this State in any case that we can find.

It is the position of the respondent that these laws should be interpreted in such a way as to make them workable. A felony is indicated here, and it should be conceded that a felony should not be indicated where there was not any facts which indicate wrongful conduct.

An examination of the proceedings of the Constitutional Convention apparently reveals that this subject is not indexed in the proceedings under monies but under the heading of "State Treasurers" which seems to indicate that the subject was considered as a matter pertaining to Treasurers or at least to persons having under their control and custody public monies. Apparently there is nothing in the proceedings before the convention that indicates the subject was one of controversy or debate, so that the proceedings have nothing in them to indicate that it was the intent to make every transaction, by one public officer with any person, the performance of which would involve

agement by the other party with public funds, to the end that the first contracting party would make a profit, would be a felony. Rather it is contended here that the plain purpose of the constitutional provision and the law was to prevent a public officer having under his control or in his charge public moneys, from using the money in any way, so as to bring himself a profit. Section 76-28-62 U.C.A., 1953, defining "Public Moneys" provides, moneys belonging to the public agency "*received or held* by state, county, district, city, town or precinct officers in *their official capacity*."

While counsel argue that the Constitutional Provision Article XIII, Section 8, of Utah Constitution, using only the words "public moneys" must include all public moneys wherever, or for whatever purpose they may be used. But the legislature in defining this term which was not attempted to be defined in the constitution does limit it to moneys *received or held in their official capacity*. This is very distinct and complete limitation, and clearly established that the provision applies to public officers who receive or hold funds in their official capacity. The argument that this constitutional provision makes it a felony for any public officer to make a profit out of any public business, where moneys have been used or expended with any other public officer, for any purpose, if a profit is involved, on the argument such is the ordinary meaning of the terms used, seems to completely ignore the purpose sought to be accomplished

by the constitution, viz: to prohibit public officers (usually treasurers) from using money for their private profit rather than acting merely as custodians of public money for the public.

It is perfectly clear in this case that Mr. Ray will not *receive or hold* any public money *in his official capacity*. It would also seem to be a far cry from the circumstances at bar, to say that having a contract to build a school house and collecting monies for performance of the contract (services rendered) is making a profit or unlawful use of public moneys.

The State Depository Act, Title 51 Chap. 1, U.C.A. 1953, would seem to be the real law that was intended to implement this constitutional provision. This law, now on the books has been changed, but it has to do with the subject of how money should be handled by Treasurers, who are the public officials usually charged with the custody and handling of public monies. Section 28-61 U.C.A., 1953, merely repeats the language of the Constitution and adds nothing that can be of any assistance in attempting to interpret the language, or determine the purpose thereof.

To interpret the Constitutional provision and statute as intending to make a felon out of every public officer who had some business transaction, that was paid out of public funds, to be a felony would be entirely against public policy and unworkable. If a justice

... he owned a service station and an officer or other public employee purchased gas which would be payable from public funds he would become a felon as a result of such a transaction. There would be no protection whatever for any business man engaged in retail or wholesale business, becoming a public officer, against prosecution for felony in most cases of which he would not even have any knowledge that the purchaser was paying for the product out of public moneys.

The Courts should make a reasonable interpretation of this language and let it apply to public officers who "hold or receive" public funds in their possession and under their control "in their official capacity" and not to every transaction where payment is made by public moneys, regardless of whether or not value is received for the payment of the money. A so-called literal construction of the language to all such transactions where commodities or services are purchased with public moneys is unreasonable, unworkable, and would be impossible to try to live with.

The fact that the Plaintiff and Respondent intends to continue his contracting business while serving as County Commissioner, which of necessity would involve bidding on Public projects, other than with Cache County, should not disqualify him from holding this public office. Plaintiff would naturally expect to make a profit on contracts he performed. The profit would be made

out of his contract which was obtained through competitive bidding, and of course public contracts are paid out of public moneys, which should not be an unlawful use of public money. The only public wherein the Plaintiff could have any influence directly or indirectly would be with the Board of County Commissioners. The Plaintiff recognizes this and is willing to forego bidding on any county business. This is as far as his influence would go and it would be un-thoughtful to assume that because of his holding this elective office that he must sacrifice his livelihood and business activities which have been developed over a period of many years. We all know that when contracts are put on bid, that the lowest bidder should obtain the contract. The requirement of competitive bidding is a protection to public agencies. Certainly there could be no conflict of interest with advantage to plaintiff, when he must compete with other contractors in bidding on public projects.

It is common knowledge that the public benefit when the most competent men available run for public office. The experiences of these successful men are to the public advantage while serving as public officials.

The so-called literal interpretation of the language in the Constitutional provision contended for by the appellant is not an interpretation of unlawful use of public funds in the usual concept of the term "unlawful".

... would make the entering into an ordinary contract with a public agency to be paid for by public funds, unlawful, and certainly no such intention was ever in the minds of the members of the constitutional convention.

Counsel mentioned the duty of the county commissioners to levy taxes. Section 59-9-6 U.C.A., 1953, makes it the duty of the County Commissioners to fix the rate of taxation for county purposes. Under this section the commissioners do have discretion. Section 59-6-3, U.C.A., 1953, provides for the County Commissioners to render an order apportioning the assessed value of property within the county among all the public agencies, but this is clearly a ministerial duty, which does not involve any discretion and certainly does not authorize the County Commissioners to receive or hold in their official capacity, or at all, any funds of other public entities.

CONCLUSION

1. There is no conflict of interest under the facts of this case, and the statute prohibiting a county commissioner from having an interest in county contracts has no application to the facts in this case.

2. The constitutional provision against unlawfully making a profit out of the unlawful use of public moneys likewise has no application here. No school board or other public monies will be received or held by the

plaintiff in his official capacity, but will be collecting for services rendered under a lawful contract. The called literal interpretation contended for by appellee if adopted would in effect hold that no business could hold public office without being subject to prosecution for a felony simply because he incidentally made a profit, in doing ordinary business with someone who was paying for these goods or services with public moneys.

Judgment should be affirmed.

Respectfully submitted
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